MOTION FILED
JUL 2 7 2009

(3)

No. 08-1589

In the
Supreme Court of the United States

THE DOW CHEMICAL COMPANY,

Petitioner,

v.

AKA RAYMOND TANOH, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CENTERPOINT ENERGY, INC., ELI LILLY & COMPANY, EXXONMOBIL CORPORATION, GENERAL ELECTRIC CO., THE NATIONAL ASSOCIATION OF MANUFACTURERS, OCCIDENTAL PETROLEUM CORP., OWENS-ILLINOIS INC., AND SHELL OIL COMPANY SUPPORTING PETITIONER

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

R. TED CRUZ
Counsel of Record
ALLYSON N. HO
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
(713) 890-5000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CENTERPOINT ENERGY, INC., ELI LILLY & COMPANY, EXXONMOBIL CORPORATION, GENERAL ELECTRIC CO., THE NATIONAL ASSOCIATION OF MANUFACTURERS, OCCIDENTAL PETROLEUM CORP., OWENS-ILLINOIS INC., AND SHELL OIL COMPANY SUPPORTING PETITIONER

CenterPoint Energy, Inc., Eli Lilly & Company, ExxonMobil Corporation, General Electric Co., The National Association of Manufacturers, Occidental Petroleum Corp., Owens-Illinois Inc., and Shell Oil Company respectfully move for leave to file the attached brief of *amici curiae* in this case. Petitioner has consented to the filing of this *amicus* brief, but respondents have withheld consent.

This case concerns the evasion of federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") by plaintiffs who have gerrymandered their common claims of law and fact into separate, identical complaints. That sort of procedural gamesmanship is precisely what CAFA was enacted to prohibit. The Ninth Circuit's decision to permit such maneuvers not only conflicts with the text, purpose, and history of CAFA – as well as published decisions of the Sixth, Seventh, and Eleventh Circuits – but has also effectively created a "CAFA-free" zone in the Ninth Circuit that can only serve as a litigation magnet.

Given the inherent dynamics of mass action litigation, the impact of the Ninth Circuit's decision and resulting circuit conflicts will be felt well beyond the immediate context and industry. The Ninth Circuit has provided plaintiffs' attorneys with a guide to keep large tort actions in state court, thereby relieving them of the duties that Congress intended to apply to such actions under CAFA. The Ninth Circuit has therefore sanctioned the very kind of evasive pleading that CAFA was intended to remedy.

Amici together employ over 500,000 workers and generate over $1 trillion in U.S. revenue annually. In addition, the National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *Amici* thus have a strong interest in this Court's resolution of the important issues presented in this case. As one would expect, a long line of large mass actions with interstate, national, and international significance is already forming in Ninth Circuit state courts. Absent this Court's resolution of the conflicts and reversal of the Ninth Circuit's decision, the forum-shopping spree will continue unabated. Indeed, the Ninth Circuit's decision affects any entity with minimum contacts in the Ninth Circuit – which of course includes California, one of the largest economies in the world.

As companies that conduct business in those jurisdictions and expend substantial money defending mass action lawsuits, *amici* have a distinct perspective on the importance of the proper interpretation of CAFA's jurisdictional rules, as well as a strong interest in ensuring their consistent and evenhanded interpretation. *Amici* write in the hope that their practical perspective may be of assistance to the Court.

Respectfully submitted,

R. TED CRUZ
Counsel of Record
ALLYSON N. HO
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
(713) 890-5000

QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

QUESTIONS PRESENTED

1. The Class Action Fairness Act of 2005 ("CAFA") permits removal of mass actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" if those common claims "otherwise meet[ ] the provisions" concerning federal jurisdiction over class actions. 28 U.S.C. § 1332(d)(11)(A)-(B)(i). In light of CAFA's objective to expand federal jurisdiction over such mass actions, can removal be evaded by intentionally dividing a mass action that otherwise meets those requirements into multiple, identical cases, each with less than 100 plaintiffs?

2. Does CAFA require a removing party to demonstrate that at least 100 plaintiffs will be parties to an actual trial of the removed action, or is removal determined at the time of filing, based on the aggregate number of plaintiffs identified in claims involving common questions of law or fact?

TABLE OF CONTENTS

Page

Table Of Authorities iii

Interest Of *Amici Curiae* 1

Introduction And Summary Of Argument..... 3

Reasons For Granting The Writ..... 5

A. The Ninth Circuit Decision Creates A Circuit Split With The Sixth Circuit And Is Inconsistent With The Plain Text And Purpose Of CAFA 5

B. The Ninth Circuit Decision Creates A Split With The Seventh And Eleventh Circuits .. 11

C. The Conflicts Created By The Ninth Circuit Involve Issues Of Exceptional Importance Warranting This Court's Review 15

Conclusion..... 23

TABLE OF AUTHORITIES

Page

CASES

Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007).....19

Bullard v. *Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008) 13, 14, 15

Castano v. *Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) 21

Freeman v. *Blue Ridge Paper Prods., Inc.*, 551 F.3d 405 (6th Cir. 2008) 8, 9, 10, 11

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 21

Lowery v. *Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2007) 12, 13

Obregon v. *Dole Food Co.*, No. CV 09-186-CAS (VBKx), 2009 WL 689899 (C.D. Cal. Mar. 9, 2009) 19

Proffitt v. *Abbott Labs.*, No. 2:08-cv-151, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008).....10

Stoneridge Inv. Partners. LLC v. *Scientific-Atlanta*, 552 U.S. 148 (2008) 19

Vanegas v. *Dole Food Co.*, No. CV 09-181-CAS (VBKx), 2009 WL 213012 (C.D. Cal. Jan. 29, 2009) 19

STATUTES

28 U.S.C. § 1332 *et seq.* .....*passim*

Class Action Fairness Act of 2005 Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005) 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

51 CONG. REC. S1076-02 (Feb. 8, 2005).....12

S. Rep. No. 109-14, at 30 (2005), *reprinted in* 2005 U.S. Code Cong. & Admin. News 3.....*passim*

John Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 CLASS ACTION LITIG. REP. (BNA) 58 (Jan. 24, 2003).....18

John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001).....17

John C. Coffee Jr. & Stefan Paulovic, *Class Certification Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. (BNA) S-787 (Oct. 26, 2007).....19

Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008).....18

Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 15 (1999).....17

Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001).....22

TABLE OF AUTHORITIES – Continued

Page

Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 CHAP. L. REV. 201 (2004).....17

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Actions*, 26 J. LEGAL STUD. 521 (1997).....20

Tillinghast Towers Perrin, 2008 Update on U.S. Tort Cost Trends.....22

INTEREST OF *AMICI CURIAE*[1]

The petition seeks review of an erroneous Ninth Circuit decision that allows plaintiffs to circumvent federal jurisdiction over large civil actions under the Class Action Fairness Act of 2005 ("CAFA") through evasive pleading. The impact of that decision, which interprets a threshold jurisdictional provision and has created a serious conflict among the courts of appeals, will impact any entity that conducts business in the Ninth Circuit – home to one of the largest economies (California) in the world.

All *amici* have a substantial business presence in the jurisdictions covered by the Ninth Circuit, and ties to companies and customers within those jurisdictions. Each year, *amici* expend substantial resources defending mass action lawsuits. Hence, *amici* have a distinct perspective on the importance of the proper interpretation of CAFA's jurisdictional rules, as well as a strong interest in ensuring that the congressional directive as to the proper fora for such actions is applied consistently.

CenterPoint Energy, Inc., is a leading electric and natural gas utility with headquarters in Houston, Texas.

---

[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief.

Eli Lilly & Company is a leading global pharmaceutical company with headquarters in Indianapolis, Indiana.

ExxonMobil Corporation is a leading global energy products and services corporation with headquarters in Irving, Texas.

General Electric Co. is a leading global technology and services company with headquarters in Fairfield, Connecticut.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

Occidental Petroleum Corp. is a leading global energy products and services corporation with headquarters in Los Angeles, California.

Owens-Illinois Inc. is a leading global manufacturing company with headquarters in Perrysburg, Ohio.

Shell Oil Company is a leading global energy products and services company with headquarters in Houston Texas.[2]

---

[2] Shell Oil Company was a party to the original complaints filed in this petition, but is not a party to the appeal. Shell now joins this brief as *amicus curiae* in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Class Action Fairness Act of 2005 ("CAFA") to address the forum shopping and procedural gamesmanship that have long plagued class actions and mass tort litigation. Since the passage of CAFA, plaintiffs' attorneys have consistently attempted to pursue end-runs around the legislation. When presented with such a stratagem – a class action of 300 or so plaintiffs and $24.5 million in controversy artificially divided into five identical complaints distinguished only by consecutive time intervals – the Sixth Circuit sensibly aggregated the common claims of law and fact and exercised federal jurisdiction under CAFA. When presented with a similarly creative maneuver – a mass action claim on behalf of 664 foreign plaintiffs and at least $49 million in controversy divided alphabetically into seven identical complaints – the Ninth Circuit gave credence to the evasive pleading and refused federal jurisdiction.

In the process, the Ninth Circuit created an additional conflict with the Seventh and Eleventh Circuits, again relying on the artifice of the evasive pleading scheme, by reading CAFA to require that a mass action propose an actual joint trial on the face of its complaint in order to establish federal jurisdiction. Because none of the seven identical complaints explicitly proposed a joint trial, the Ninth Circuit denied federal jurisdiction. By contrast, the Seventh and Eleventh Circuits have looked beyond evasive pleadings or representations to the underlying claims

involving common questions of law or fact in determining whether a joint trial has been proposed for jurisdictional purposes under CAFA.

The Ninth Circuit's error and the resulting conflicts warrant review. The history of class actions and mass tort litigation demonstrates that news travels fast. Once a court creates a favorable loophole for filing, it becomes a magnet for filings from around the country. Indeed, the existence of such anomalous "jackpot" jurisdictions in remote parts of the state-court system was one of the primary reasons why Congress believed that federal jurisdiction needed to be expanded.

The Ninth Circuit, already considered a favorable location for federal class actions, has now given plaintiffs' attorneys a powerful tool – the ability to remain in state court by simply dividing a mass action complaint in any arbitrary fashion as long as each individual filing falls under the CAFA numerical thresholds. Not surprisingly, there has already been a proliferation of copycat claims and pleading schemes as a result of the court of appeals' decision.

Unless the Court corrects that error and resolves these conflicts, companies throughout the United States with minimum long-arm presence in the Ninth Circuit will find themselves defending multiple large mass actions in local state courts, when Congress, with good reason, mandated that they be heard instead in federal court. For those reasons, the

petition should be granted and the judgment of the court of appeals should be reversed.

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT DECISION CREATES A CIRCUIT SPLIT WITH THE SIXTH CIRCUIT AND IS INCONSISTENT WITH THE PLAIN TEXT AND PURPOSE OF CAFA.

Congress enacted CAFA to expand federal jurisdiction over class and mass actions and to put an end to the practice of gerrymandering complaints to shop for the most lucrative forum. The Act thus endeavors to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005).

To accomplish those purposes, CAFA permits the removal of interstate and international class actions involving 100 or more similarly affected plaintiffs, 28 U.S.C. § 1332(d)(5)(B), and an amount in controversy in excess of $5,000,000. 28 U.S.C. § 1332(d)(2). The common claims of the individual plaintiffs "shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). Mass action cases that meet these criteria are to be treated as class actions for removal purposes. 28

U.S.C. § 1332(d)(11)(A) ("For purposes of this subsection [subsection 1332(d) concerning application of federal diversity jurisdiction] and section 1453 [class action removal], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

As the Senate Committee Report explains, "the overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 30 (2005), *reprinted in* 2005 U.S. Code Cong. & Admin. News 3, 34. Consequently, the definition of class action is "to be interpreted liberally * * * [and] should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff." *Ibid.* "*[L]awsuits that resemble a purported class action should be considered class actions* for the purpose of applying these provisions." *Ibid.* (emphasis added).

Specifically, the Report concluded that mass actions are "simply class actions in disguise," *id.* at 41, "function very much like class actions and are subject to many of the same abuses." *Id.* at 40. It explains that CAFA expanded "federal jurisdiction over mass actions – suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status." *Ibid.*

Before CAFA, lawyers could "'game' the procedural rules and keep nationwide or multi-state actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. 109-14, at 3. Correspondingly, one of Congress's primary concerns was "[w]hether the class action has been pleaded in a manner that seeks to avoid jurisdiction." *Id.* at 36. Reflecting Congress's intention "that plaintiffs not be able to plead around" the jurisdictional requirements with "creative legal theories," *id.* at 33, even in an action where up to two-thirds of plaintiffs and the primary defendant are citizens of the filing state, if the "*federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction.*" *Ibid.*; 28 U.S.C. § 1332(d)(3)(C) (emphasis added).

In this case, where "two-thirds or more of the members of the plaintiffs class or one or more of the primary defendants are not citizens of the state in which the action was filed," and the common claims in aggregate meet the jurisdictional thresholds of section 1332(d)(2)-(10), congressional will is less discretionary. The action "*will* be subject to federal jurisdiction." S. Rep. 109-14, at 30 (emphasis added).

The Ninth Circuit's decision to allow plaintiffs to evade federal jurisdiction by artificially dividing their mass action claim alphabetically by plaintiff into seven identical actions not only undermines CAFA, but has also created a conflict with the Sixth Circuit.

In *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 407 (6th Cir. 2008), the Sixth Circuit followed the congressional mandate to look behind such evasive pleading and decide jurisdictional issues based on the aggregate size and requested relief for all common claims. *Freeman* involved a class action on behalf of almost 300 landowners seeking approximately $24.5 million in damages for nuisance due to water pollution from a paper mill. The plaintiffs' attorney brought the suit in the form of five identical complaints divided into sequential time intervals, each complaint conveniently seeking damages of $4.9 million and $74,000 per individual. *Id.* at 406.

The district court remanded the case. The Sixth Circuit reversed. Noting that "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction," the court held that since there was "no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction," the class size and amount in controversy for the five complaints of common, indeed identical, claims of law and fact had to be aggregated for determining whether the § 1332(d) thresholds had been met. *Id.* at 407.

By contrast, the Ninth Circuit rewarded plaintiffs' chicanery. The court permitted the 664 foreign plaintiffs, represented by the same attorney and alleging civil claims amounting in aggregate to at least $49 million, to evade federal jurisdiction by carving the mass action claim alphabetically into seven identical complaints. Pet. App. at 10. Because

each alphabetical grouping technically contained fewer than 100 plaintiffs, the Ninth Circuit determined that none of the complaints constituted a "mass action" as defined in section 1332(d)(11)(B)(i), and could not be joined by motion of the defendant in order to do so under section 1332(d)(11)(B)(ii).[3] That was error.

As in *Freeman*, the action in this petition satisfies the CAFA thresholds when the common "claims" repeated verbatim were considered in aggregate (as is

---

[3] Section 1332(d)(11)(B)(i) provides:

> As used in subparagraph (A), the term "mass action" means any civil action * * * in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Section 1332(d)(11)(B)(ii) provides:

> As used in subparagraph (A), the term "mass action" shall not include any civil action in which – * * * (II) the claims are joined upon motion of a defendant * * * * *"

The Senate Report explains that concerning mass actions, Congress not only sought to address the "same abuses as class actions" but also to prevent joinder of claims "*that have little to do with each other* and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury." S. Rep. 109-14, at 41 (emphasis added). In this case, the Ninth Circuit did not address that language in the legislative history and did not suggest that the seven identical complaints were factually unrelated.

required under section 1332(d)(6)). And like *Freeman*, albeit with less creativity and margin for error (the seven complaints each meet the amount in controversy threshold anyway), there was no basis for the alphabetical grouping save the evasion of federal jurisdiction.

The Ninth Circuit acknowledged that the Sixth Circuit had rejected schematic pleading to avoid CAFA's jurisdictional requirements. But it argued, still relying upon plaintiffs' evasive pleading, that the plaintiffs had chosen not to proceed as a class, and hence the "concerns animating *Freeman* and *Proffitt*[4] simply are not present in this case, as * * * each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the [alphabetized] plaintiff groups stand to recover in excess of CAFA's $5 million threshold between the seven suits." Pet. App. at 23 (emphasis in original).[5]

---

[4] As acknowledged in *Freeman*, a district court in the Sixth Circuit had also rejected an attempt to evade jurisdiction by dividing a class into arbitrary time periods. See *Proffitt* v. *Abbott Labs.*, No. 2:08-cv-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008).

[5] The Ninth Circuit also misconstrued *Freeman*, contending that its holding was limited "to the situation where there is no colorable basis for dividing up the sought-for retrospective relief *into separate time periods*, other than to frustrate CAFA." Pet. App. at 29 (emphasis in original) (quoting *Freeman*, 551 F.3d at 409). As is evident from the context of the quoted language, the Sixth Circuit sought only to limit its holding "to the situation *where there is no colorable basis for dividing up* the sought-for

(Continued on following page)

In so doing, the Ninth Circuit, while paying lip service to CAFA's intent to weed out "copycat" actions, Pet. App. at 20-21, ignored its text, which states that "a mass action shall be deemed to be a class action removable under [section 1332(d)(2)-(10)] if it otherwise meets the provisions of those paragraphs," section 1332(d)(11)(A), as well as its purpose of eradicating claims that appear "to be gerrymandered solely to avoid federal jurisdiction * * * * " S. Rep. 109-14, at 36; see also *supra* note 3. That evasion of congressional will should not stand.

B. THE NINTH CIRCUIT DECISION CREATES A SPLIT WITH THE SEVENTH AND ELEVENTH CIRCUITS.

The overarching theme of the Ninth Circuit's opinion is that plaintiffs can make an end-run around CAFA simply by deciding not to seek certification or explicitly demand a joint trial. Pet. App. at 21 ("none of [the out of circuit cases] addressed CAFA's 'mass action' or 'numerosity' provisions"). The Ninth Circuit thereby ignored not only the text, purpose, and history of section 1332(d)(11)(A),[6]

---

retrospective relief into separate time periods, *other than to frustrate* CAFA." *Freeman*, 551 F.3d at 409.

[6] As explained on the Senate floor:

> [I]t is vital that we retain the mass action section of the bill without an amendment ***so that we don't open the door for lawyers to make an end run around what we are trying to do with class***

(Continued on following page)

but also section 1332(d)(11)(B)(i)-(ii)(II), seeing it as rendering section 1332(d)(2)-(10) jurisdiction "fairly narrow" and mass actions effectively non-removable for claims involving 100 or more plaintiffs carved up artificially. However, the text makes clear that Congress was attempting to address the egregious form of procedural gamesmanship whereby parties arbitrarily combine claims that do not "involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i); *supra* note 4.[7]

In contrast to the Ninth Circuit, the Seventh and Eleventh Circuits properly recognize that "any 'mass action' is also considered a 'class action' for the purposes of CAFA's removal provisions." *Lowery* v. *Ala. Power Co.*, 483 F.3d 1184, 1195 (11th Cir. 2007). As the Eleventh Circuit explained, "[i]n extending CAFA to large individual state court cases that are functionally indistinguishable from class actions, the mass action provision prevents plaintiffs' counsel

---

actions in this bill. The mass action section was specifically included to prevent plaintiffs' lawyers from making this end run.

51 CONG. REC. S1076-02, S1082 (Feb. 8, 2005) (Statement of Sen. Lott) (emphasis added).

[7] See also 51 CONG. REC. S1076-02, S1082 (Feb. 8, 2005) (Statement of Sen. Lott) (noting that in states that do not provide a class action device "plaintiffs' lawyers often bring together hundreds, sometimes thousands of plaintiffs to try their claims jointly without having to meet the class action requirements, and often the claims of the multiple plaintiffs *have little to do with each other*") (emphasis added).

from avoiding CAFA's expanded federal jurisdiction by simply choosing not to seek class certification." *Lowery*, 483 F.3d at 1198, n.32.[8]

Similarly, in *Bullard* v. *Burlington Northern Santa Fe Railway Co.*, the Seventh Circuit acknowledged that § 1332(d)(11)(A) "defines a class action to *include* a mass action." 535 F.3d 759, 762 (7th Cir. 2008)) (emphasis in original). Accordingly, the "import of the shared class action definition in CAFA's various provisions is that any lawsuit that meets the jurisdictional requirements of a 'mass action' is also a removable 'class action.'" *Lowery*, 483 F.3d at 1195, n.27 ("[U]nder CAFA, a mass action simultaneously *is* a class action (for CAFA's purposes) and *is not* a class action (in the traditional sense of Rule 23 and analogous state law provisions.")) (emphasis in original).

More specifically, there is an irreconcilable conflict among the Seventh, Ninth, and Eleventh Circuits as to whether the language in section 1332(d)(11)(B)(i) referring to mass actions as "claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" creates a loophole that permits plaintiffs' to evade jurisdiction by not technically

---

[8] Although the Eleventh Circuit ultimately remanded in *Lowery* for failure to satisfy CAFA's jurisdictional minimum amount in controversy, the remand did not alter the Court's analysis on this issue.

asking for a common trial over non-certified classes at the removal stage.

The Seventh Circuit correctly rejected that reading of CAFA, viewing it as rendering section 1332(d)(11), which defines class actions to include mass actions, a nullity. *Bullard*, 535 F.3d at 762. Instead, the issue is whether "the *claims* arise out of 'the same transaction or series of transactions' and '*common* questions of law or fact' are present." *Ibid.* (emphasis added) (citations omitted). Thus, in the Seventh Circuit's understanding, section 1332(d)(11)(B)(i) is designed to ensure not that "100 or more plaintiffs answer a roll call in court," but that there is no automatic federal jurisdiction under the mass action provision for claims that are otherwise unrelated and consolidated solely for pretrial purposes. *Ibid.*

In similar fashion, the Eleventh Circuit explained that the "commonality requirement: 'the plaintiffs' claims [must] involve common questions of law and fact,'" is crucial to understanding section 1332(d)(11)(B)(i). *Lowery*, 483 F.3d at 1202. The Seventh and Eleventh Circuits have thus followed Congress's directive to ignore plaintiffs' packaging and focus on the underlying *common claims* of law or fact when aggregating for purposes of jurisdiction under section 1332(d).

By contrast, the Ninth Circuit ignored the qualifying commonality language in CAFA, and again relying upon plaintiffs' evasive pleading, held that as long as plaintiffs do not technically propose a joint

trial of 100 or more plaintiffs in any otherwise common complaint, there is no jurisdiction. Pet. App. at 16 ("CAFA's 'mass action' provision applies only to civil actions in which the 'monetary' relief claims of 100 or more persons are proposed to be tried jointly * * * [b]y its plain terms, § 1332(d)(11) does not apply to plaintiffs' claims in this case as none of the seven state court actions involves the claims of one hundred or more plaintiffs.").

The Ninth Circuit's error is significant, as it allows plaintiffs to avoid federal jurisdiction and remain in state court throughout the entirety of the pretrial period over identical complaints of common law or fact, but yet, assuming a defendant is not forced to settle, would not prohibit a request for consolidation of a joint proceeding immediately before trial. See *Bullard*, 535 F.3d at 762 ("But nothing in § 1332(d)(11) says that the eve of trial is the *only* time when a 'mass action' can be detected.") (emphasis in original).

C. THE CONFLICTS CREATED BY THE NINTH CIRCUIT INVOLVE ISSUES OF EXCEPTIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW.

There is no need to wait to resolve the conflicts created by the Ninth Circuit's decision. Indeed, given the inherent dynamics of class and mass actions, the Ninth Circuit will now predictably become a magnet for such filings – which means that the split is

unlikely to deepen because more and more of these cases will simply be filed in the Ninth Circuit. Percolation would therefore serve no useful purpose, and only compound the national problems created by the Ninth Circuit's decision.

Those problems are of serious magnitude. Class actions "typically involve more people, more money, and more interstate [and international] commerce ramification than any other type of lawsuit." S. Rep. 109-14, at 4. One need look no further than the pre-CAFA regime – which has now been effectively restored in the Ninth Circuit – to appreciate the significant, practical consequences if the Ninth Circuit's decision stands.

In enacting CAFA, Congress was concerned about the "nonsensical result" of evading federal jurisdiction such that "a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states [or foreign persons] and alleging claims against a manufacturer that are collectively worth $15 billion" were heard in state court. *Id.* at 8.

Further, in Congress's view, state courts may apply governing rules "inconsistently (frequently in a manner that contravenes basis fairness and due process considerations) and * * * [provide] inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 3. Federal trial courts are often better equipped than state

counterparts to manage the substantial burdens of the sprawling, complex proceedings. See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 151 (2001). Congress did not view this evasion as merely an academic problem. *Ibid.*; see also Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 CHAP. L. REV. 201, 218 (2004) ("Federal courts are better equipped to handle cases with national implications, and generally are more competent in certifying and managing these cases.").

Once ensconced in state courts, plaintiffs would further shop around for the friendliest county courthouses. See Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 15 (1999). That created a phenomenon where certain state courts would experience class action filing rates that were vastly disproportionate to their population. See 25 HARV. J. L. & PUB. POL'Y at 161-63 (noting that the *per capita* rate of state court class action filings in the small, rural county of Madison County, Illinois, was about eight times higher than the federal court systems). Once a particular court or judge was found to be certification-friendly, out-of-county plaintiffs would flock to the area and file duplicative, "copycat" pleadings, see *id.*

at 163-64, as well as expand the local "practice" to other major industries.[9]

The avoidance of plaintiffs' burrowing into local courts with an "I never met a class action I didn't like" approach was one of the main abuses CAFA sought to correct. S. Rep. 109-14, at 18 (citation omitted). The indications are that CAFA is having its intended effect in previously magnetic counties. See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1609-10 (2008) (noting that class action filings in Madison County totaled 106 in 2003 and 84 in 2004, but dropped to 3 in 2006).

The Ninth Circuit's decision thwarts clear congressional intent to eliminate evasive pleading in the context of class and mass actions and, in the process, turns back the clock on aggressive forum shopping. It ensures that future Madison Counties

---

[9] For instance, in Madison County, Illinois, a series of favorable financial service class action decisions eventually attracted cases concerning hotel energy fees against Wyndham Hotels (which had no units in the county); chicken carcass water retention claims against Tyson Foods (predicated upon one couple that bought Tyson chicken from the local store); and breach of insurance company fee arrangement claims against Blue Cross-Blue Shield (based on one doctor's agreement with that company). See John Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 CLASS ACTION LITIG. REP. (BNA) 58 (Jan. 24, 2003). From 1998 to 2000, class action filings increased over 1800% and over 80% of the county docket consisted of class actions.

will be located within this jurisdiction. Already one of the most favorable federal jurisdictions for class certifications, see John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. (BNA) S-787, S-819 (Oct. 26, 2007), the Ninth Circuit has now given plaintiffs another inviting option – remaining in state court as long as each arbitrarily divided complaint mathematically falls just under CAFA's thresholds. 28 U.S.C. § 1332(d)(11)(A). The evidence suggests that plaintiffs have already begun accepting the Ninth Circuit's invitation. See, e.g., *Vanegas* v. *Dole Food Co.*, No. CV 09-181-CAS (VBKx), 2009 WL 213012, at *1 (C.D. Cal. Jan. 29, 2009) (citing this case and remanding action on behalf of foreign banana plantation workers against several companies where plaintiffs divided mass action alphabetically such that each case has less than 100 plaintiffs); see also *Obregon* v. *Dole Food Co.*, No. CV 09-186-CAS (VBKx), 2009 WL 689899, at *4 (C.D. Cal. Mar. 9, 2009) (same).

Review is further warranted because jurisdiction is a crucial element of class actions and mass tort litigation. The sheer size and breadth of most class actions bring to bear an inordinate pressure upon defendants to settle. See, e.g., *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings."), *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 159

(2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Actions*, 26 J. LEGAL STUD. 521 (1997) ("Class certification in a mass tort case confers extraordinary negotiating power even where the underlying claim is meritless * * * * The power is so extreme that all mass tort claims certified as classes appear to settle, rather than litigate to judgment."). Accordingly, in response to the inundation of mass tort cases in the 1970s and 1980s, courts began to entertain extraordinary procedural remedies to counter the tactical imbalance. As the Seventh Circuit noted in granting mandamus relief to defendants' challenge of a district court certification of 120,000 plaintiffs in a high-profile exposure case:

> The plaintiffs' able counsel argues that we need not intervene now, that it will be time enough to intervene * * * when a final judgment is entered * * * * [That] will come too late to provide effective relief to the defendants * * * [because of] the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them * * * * It is true that [class certification] would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably

> more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir. 1995) (internal quotations and citations omitted); see also *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low * * * * These settlements have been referred to as judicial blackmail.") (citation omitted).

Congress considered that hydraulic settlement pressure, particularly prevalent in magnet state court jurisdictions, as one of the primary reasons why federal jurisdiction needed to be expanded in CAFA. See S. Rep. 109-14, at 16 (2005) ("Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly * * * [that] can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits.").

The conflicts created by the Ninth Circuit concern a threshold jurisdictional provision, and thus reverberate well beyond the immediate context and industry. Each year, businesses expend substantial money to defend against the filing and even the

threat of class actions.[10] Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are passed on to consumers or absorbed as a loss to the company. In some cases, a company will be forced out of business because of expensive litigation. That is certainly not to say that all class actions are frivolous. It is to say that fidelity to the congressional mandate as to the proper forum for such actions is critical to accomplish Congress's objectives of legal and economic certainty and avoiding the risk that lengthy and expensive efforts in one judicial system or the other will be wasted.

---

[10] Because of the settlement pressure identified above, many lawsuits do not result in reported decisions or adequate records of class action costs, particularly in state courts. Thus, even extensive studies like those conducted by notable institutes like the RAND Corporation have had difficulty quantifying the volume of class and mass action suits and related expenditures with specificity. See Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 184 (2001). A major international insurance firm study has concluded that the total cost of all U.S. tort litigation, of which class and mass actions comprise a substantial portion, was $252 billion (or 1.83% of U.S. GDP) in 2007, compared with $260.3 billion (2.23%) and $261.4 billion (2.10%) in 2004 and 2005, respectively. See Tillinghast Towers Perrin, 2008 Update on U.S. Tort Cost Trends, available at http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2008/200811/2008_tort_costs_trends.pdf.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

R. TED CRUZ
Counsel of Record
ALLYSON N. HO
ALBERT C. LAMBERT
MORGAN, LEWIS
& BOCKIUS LLP
1000 Louisiana Street,
Suite 4200
Houston, Texas 77002
(713) 890-5000